

In the Matter of License No. R-3483 Merchant Mariner's Document No.  
Z-45947-D2

Issued to: EARNEST W. KERN

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1462

EARNEST W. KERN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 18 February 1964, an Examiner of the United States Coast Guard at Philadelphia, Pennsylvania, suspended Appellant's seaman documents for six months outright plus six months on twelve months' probation upon finding him guilty of misconduct. The two specification found proved allege that while serving as radio operator on board the United States SS HAWAIIAN EDUCATOR under authority of the license above described, on 21 January 1964, Appellant wrongfully disobeyed a lawful command of the Master and created a disturbance while under the influence of intoxicants.

On 22 January 1964, the hearing was transferred from Long Beach, California, to Philadelphia at Appellant's request. On 7 February, Appellant was served with charges to appear at a hearing on 11 February but due to weather conditions the ship did not arrive at Philadelphia until the night of 12 February. On 11 February, Appellant was informed that the hearing would be held on 13 February in order to obtain the testimony of witnesses on the ship since she was scheduled to depart on the latter date and would not return for two months.

At the beginning of the hearing on 13 February, Appellant stated that his counsel, a magazine correspondent from New York, had arranged to be present on 11 February but could not attend on 13 February. The Examiner directed the hearing to proceed in order to obtain the testimony of witnesses while they were available.

Appellant entered a plea of not guilty to the charge and each specification before the Investigating Officer introduced in evidence the testimony of the Master, Chief Mate and a messman. Appellant cross-examined each witness. The Government also submitted an entry in the ship's Official Logbook which pertained to the alleged offenses.

At this point, the Examiner repeatedly offered to grant a continuance for Appellant to subpoena witnesses or to obtain counsel to assist Appellant in preparing his defense. Appellant freely declined the opportunity to obtain a continuance and decided to testify in his behalf.

Appellant denied that he was guilty of either offense. Appellant stated that he did not have anything to drink on the date of the alleged offenses but he had a hang-over and was discharged by the Master because he became angry when Appellant kept inquiring as to when the ship would sail. Appellant testified that he did not realize until recently that he is an alcoholic and he had been going to Alcoholics Anonymous meetings for the past three weeks.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and two specifications had been proved. The order imposed included a prior six months' suspension which had been placed on twenty-four months' probation in August 1962.

#### FINDINGS OF FACT

On 21 January 1964, Appellant was serving as radio operator on board the United States SS HAWAIIAN EDUCATOR and acting under authority of his license while the ship was in a dry dock at San Pedro, California.

At breakfast on this date, Appellant was under the influence of intoxicants when he questioned the Master about the sailing time and the cause of the propeller damage as a result of which the ship was in dry dock. The Master said he did not know the answer to either question at the time and suggested that Appellant go to his room and sleep it off. Since Appellant ignored this advice and continued to harangue the Master, the latter left the officer's saloon.

Shortly thereafter, Appellant went to the Master's office where he was working and insisted on knowing when the ship would leave dry dock. The Master told Appellant to go to his room and get some sleep, and walked with Appellant toward his quarters. Appellant stopped at the lifeboat davits where crew members were working. Appellant interfered with their work to some extent when he started to talk to them in a loud, raucous voice. Appellant was also unsteady on his feet and talked incoherently. The Master left Appellant and returned to his office after telling the Chief Mate to get Appellant to his room.

Appellant went to his room but returned to the Master's office in three or four minutes. The Master ordered Appellant to go to

his room. When Appellant did not obey this order after it was repeated, the Master told Appellant that he was discharged. The Master then told the Chief Mate to alert other crew members to watch Appellant so that he would not injure himself. (The record is not clear as to whether or not Appellant went to his room eventually.) Appellant signed off the shipping articles for the voyage on the following day.

Appellant's prior record consists of an admonition in 1945 for failure to report promptly for duty; a probationary suspension in 1953 for failure to perform duties due to intoxication; an admonition in 1959 for failure to perform duties due to intoxication; and the probationary suspension of August 1962 for failure to perform duties due to intoxication.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that there was no jurisdiction because the ship was out of operation in dry dock and because the shipping articles were breached when the original Master was relieved for a vacation. Appellant did not disobey since he went to his room when ordered by the Master to do so. Appellant had a hang-over from drinking on the night before but he was not intoxicated on the date of the alleged offenses.

#### OPINION

There is substantial evidence to support the conclusion that Appellant was guilty of the two offenses alleged, that Appellant was intoxicated at the time, and that this proceeding was properly conducted.

The jurisdiction to take this action is clear not only from the provision for a substitute Master contained in the standard form used for shipping articles but also from the repeated assertions of Appellant that he was serving as the radio operator on this ship. In the latter situation, he was required to have a radio operator's license even if he had not been bound by the shipping articles. Therefore, he was acting under the authority of this license regardless of the fact that he was not on watch while the ship was in dry dock.

Despite the inability of the magazine correspondent to appear as Appellant's counsel on 13 February, it was proper to proceed with the hearing in order to obtain the testimony of witnesses who were departing on the ship on the same day. Appellant's later failure to take advantage of the opportunity to obtain a continuance indicates that he did not feel his cause was prejudiced

by the absence of the magazine correspondent on 13 February.

On the merits of the case, the fact of Appellant's intoxication, which contributed to his commission of the two offenses, was established by the testimony of all three Government witnesses.

As to the disobedience of the Master's order, he first advised Appellant to go to his room when the two seamen were in the saloon at breakfast. Then when Appellant disturbed the Master while he was working in his office, the Master ordered Appellant to go to his room and sleep. The Chief Mate in the next room heard this order. With some delay, Appellant obeyed the first part of the order but not the second part since he was back at the Master's office in a few minutes. At this time, Appellant failed to obey the order to go to his room until the Master told Appellant that he was discharged from the ship.

With respect to the other offense, Appellant's conduct up to the time he was discharged so disrupted the orderly routine of the ship as to constitute a continuing disturbance. Appellant annoyed the Master in the saloon until he left. Then Appellant interrupted the Master's work and interfered with the work of the crew members near the lifeboat davits. Appellant's condition was such that the Master told the Chief Mate to warn the crew members to keep Appellant under observation. These factors constitute evidence that Appellant created a disturbance.

The order is not considered to be excessive despite evidence that Appellant is an excellent radio operator when he is sober and the fact that these offenses were committed while Appellant was not on duty. On the other hand, Appellant has a prior record of similar offenses involving intoxication and he admitted that he is an alcoholic. Also, the outright suspension of six months consists solely of revocation of the probation imposed in August 1962. This period of time ashore could be used to benefit Appellant in controlling his problem. In addition to the fact that he will be able to attend meetings as he testified he had been doing, the Commandant has stated, in Appeal No. 1082, that merchant vessels are not considered to be suitable rehabilitation centers for persons in Appellant's condition.

#### ORDER

The order of the Examiner dated at Philadelphia, Pennsylvania, on 18 February 1964, is AFFIRMED.

W. D. Shields  
Vice Admiral, United States Coast Guard

Acting Commandant

Signed at Washington, D.C., this 23rd day of July 1964.